(BRITISH MILITARY ADMINISTRATION)

IN RE LOH KAI FATT.

[Perak Criminal Trial (Lt.-Col. J. G. Adams (President) Captain F. Bedder and W. A. Vaughan) May 28, 1946]

F. M. S. Emergency Regulations, Regulation 31 — Giving information to occupying power against persons who had information concerning guerillo troops in Malaya — Whether this constitutes an offence under Emergency Regulation 31 — Duties of occupying Power and of occupied population.

The accused a British Protected person was charged with three offences under Emergency Regulation 31 of the Federated Malay States. The prosecution proved in respect of the first charge that the accused gave information against one Neral Moreira who was listening to foreign broadcasts from the Domei News Agency and spreading it to his friends and that as a result of such information the said Neral Moreira was arrested. In regard to the second and third charges the prosecution proved that the accused gave information which led to the arrest of one M. M. Deen and one Phang Kwee Chen who had information concerning the Malayan People's Anti-Japanese Army, which later became a part of the Allied Forces of the United Nations.

Held (1) with regard to the first charge, that as the occupying power has a right to request the help of inhabitants of the occupied country for putting down subversive activities, the accused has not committed any offence in giving information which implicated only Neral Moreira and the civil population who were listening to his propaganda.

(2) with regard to the second and third charges, that the accused was guilty of offences under Emergency Regulation 31 as he should not have supplied information to the occupying power about the army of the other belligerent power or its means of defence.

H. T. Ong and Yeoh Cheang Lee for the Prosecution.

S. M. Sharma for the accused.

The facts and arguments sufficiently appear from the Judgment below.

The judgment of the Court was read by:

Lt. Col. J. G. Adams : — The accused, LOH KAI FATT, has been charged before us with three offences under the Emergency Reg. 31 of the Federated Malay States. The case has lasted 5 days and the Court has listened with very great patience to a wealth of evidence which it, in the first place, considered to be irrelevant but which it subsequently admitted, because, in coming to a decision on the state of the accused's mind certain evidence as to his habits and as to his loyalty were considered to be material factors.

We wish it to be made known that we consider that Mr. Ong has prosecuted this case on behalf of the Attorney-General with that fairness which one naturally expects of him and we are grateful to him for his firm but restrained handling of this case. We also feel that we should thank Mr. Sharma for his erudite exposition of the law as he reads it on the behalf of the defence.

As has already been said this is a case of extreme legal complexity and we feel that one must necessarily start at the beginning and trace out the legal effect of the events of the last 3½ years.

On the 15th of Feb. 1942, the last stronghold in Malaya fell to the Japanese and in view of the fact that the legitimate Government was, by the act of the invader, rendered incapable of publicly exercising its authority, and in view of the fact that the Japanese were in a position to substitute their own authority for that of the legitimate Government, it can be said that the Occupation of Malaya, as envisaged by the Hague Rules, was then effective.

The old law of Conquest whereby conquered territory became the property of the conqueror is no longer recognised by International Law. During the occupation by the enemy, the sovereignty of the legitimate owner of the territory is only temporarily latent and it still exists and in no way passes to the Occupant. The latter's rights are merely transitory and he must only exercise such power as is necessary for the purposes of War, the maintenance of order and safety and the proper administration of the country. It is no longer considered permissible for him to work his will unhindered, altering the existing form of government, upsetting the constitution and domestic laws and ignoring the rights of the inhabitants. The Victor under Rule 45 of the Hague Rules is distinctly forbidden to force the inhabitants of the occupied territory to swear allegiance to him for they remain as subjects of their sovereign and continue to have patriotic duties to their country.

This case is complicated by the fact that the accused is not a British Subject but is a British Protected Person. It is true that he took some form of oath of allegiance when he joined the Local Defence Corps but the prosecution has not been able to produce a copy of the form of oath and though the accused has admitted that he by the oath "promised to help the British" the Court has not taken that into

consideration in dealing with the question of his allegiance.

The accused was born in the Federated Malay States and was, therefore, as has been said, a British Protected Person. It will be noticed that under Reg. 31 it is an offence under the Regulation to do an act with intent to assist the enemy which is likely to assist the enemy or to prejudice public safety, the defence of the Federated Malay States or the efficient prosecution of the war. It is true that the word "or" must be read as disjunctive but we are of the opinion that any act which can be defined as falling into any of those compartments, if done with the necessary intent, is necessarily an offence under this Regulation, whatever the nationality of the person performing the act may be.

It has been argued by Mr. Sharma that the allegiance of the accused to the British Crown and its Armed Forces was severed when the contractual obligation of the British Crown to protect the Federated Malay States was not fulfilled. That may be. But the accused is not charged with treason against the British Crown but with an offence of assisting the enemy of the Federated Malay States. The fact that the accused was born and bred and made his money in the Federated Malay States and the fact that he joined the Local Defence Corps surely must mean that he recognised an allegiance to the Government of the Federated Malay States. That being the case, he still owes the normal duties of a citizen to the Government of the Federated Malay States and as has been pointed out above, the occupation by the Japanese of Malaya did not absolve him from those rights and duties because the effect of occupation does not establish the right of the occupier to exact allegiance from the subjected peoples.

It has been stated already in this judgment that the Occupying Power cannot willy nilly alter the existing laws of the State which it occupies, and in fact under a proclamation published in the Perak Government Gazette of 25th July 2602, (1942), as Notification No. 101, it was thereby proclaimed that all Federated Malay States and Perak Enactments and all Rules, by-laws and Regulations made thereunder, and all unwritten laws which were in force in the State of Perak on the 8th day of Dec. 2601 (1941), should continue to be in force in the State of Perak subject to such variations, additions and alterations as have been, or may hereafter be, made by the Governor of Perak or by any officer or officers to whom power is delegated by him. In the absence, therefore, of any variation, addition or alteration as aforesaid, the Emergency Regulations of the Federated Malay States must in fact have been confirmed by this proclamation. It has not been alleged by the Defence nor can the Court find any Proclamation, Enactment, or Order issued by the Occupying Power suspending these Regulations.

The next point that we wish to consider is the duty of the Occupied to the Occupier. It is not proposed to go into this at length but only to deal with that part of the rights and duties of the Occupied to the Occupier as concern this present case. On this point, the most succinct exposition of the position is set out in paras. 382, 383, and 384 of Chap. XIV of the Manual of Military Law, 1929 Edition, and these are as follows:—

> 382. It has already been stated that obedience to the Occupant is one of the implied conditions of the special position accorded to the peaceful inhabitants. Practically, they must give to his administration the same obedience, short of acknowledging his sovereignty, which they rendered to their own Government before occupation. The claim to obedience is, however, limited by the three rules—(i) that "a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country even if they were in the service of the belligerent before the commencement of the war." (ii) that the services demanded of inhabitants shall be "of such nature as not to involve them in the obligation of taking part in military operations against their own country"; and (iii) that "a belligerent is forbidden to compel the inhabitants of territory occupied by him to furnish information about the army of the other belligerent, or about its means of defence."
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> 383. It is the duty of the Occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with, and generally that duress, unlawful and criminal attacks on their persons, and felonious actions as regards their property are just as punishable as in times of peace.
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> 384. In return for this considerate treatment it is the duty of the inhabitants to behave in an absolutely peaceful manner, to carry on their ordinary pursuits as far as is possible, to take part in no way in the hostilities, to refrain from every injury to the troops of the Occupant, and from any act prejudicial to their operations, and to render obedience to the officials of the Occupant. Any violation of this duty is punishable by the Occupant.

We wish to underline Rule (iii) contained in para. 382 because that has a very great bearing on the present case.

It is within the judicial knowledge of this Court that Force 136 was controlled in the first instance from GHQ Delhi, and that that Force was responsible

for organising, equipping and training that magnificent body of men known as the Malayan People's Anti-Japanese Army, the 5th Independent Regiment, of which was operating in this area. This Force subsequently became a part of South East Asia Command under the direction of Admiral Lord Louis Mountbatten, the Supreme Allied Commander, and as such were part of the Armed Forces of the United Nations.

It will be noted from para. 384 that it is the duty of the Occupied to refrain from any injury to the troops of the Occupant and from any act prejudicial to their operation and any breach of such rules of obedience constitutes the crime of War Treason and as such the inhabitants can be punished for any such transgression. Further, if contrary to the duty of the inhabitants to remain peaceful, hostile acts are committed by individual inhabitants, a belligerent is justified in requiring the aid of the population to prevent their recurrence, and in serious and urgent cases in resorting to reprisals. An act of disobedience to the Occupying Power is not excusable because it is committed in consequence of the orders of the legitimate government and any attempt to keep up relations with that government or to act in understanding with it to the detriment of the Occupant is punishable as War Treason.

Under the Maintenance of Public Peace and Order Law, the Occupying Power laid down certain Articles to enforce public safety within Malaya and although the punishments thereunder may be said to be excessively severe, that law can in no way be said to be ultra vires. Any transgression of those articles rendered the person so committing the act to the penalties set out therein.

Having dealt at length with the complicated legal aspect we can now turn to the evidence, but before doing so we wish it placed on record that this is a Court of Law and not a Court of morals and that, therefore, this case must be decided, not on what we feel or what we think or would like to think, but on the actual evidence which has been led before us and the principles of law which have been laid down in the Courts for many years. The evidence consists of that of three victims — Neral Moreira, Phang Kwee Chen and M. M. Deen — and that of Chan Tin Weng and Leong Sze Chun, and finally of Sgt. Yoshimura Ekio of the Imperial Japanese Army who was responsible for the internal security of Perak.

The evidence of Neral Moreira is quite straightforward. He was listening to foreign broadcasts from the Domei News Agency and spreading it to his friends in order to keep up their morale. We think this probably constituted an offence under Article 6 of the Maintenance of Public Peace and Order Law. We think, however, that it must be taken as within the judicial knowledge of this Court that this war has in fact been a Total War and that the civilian has been embroiled in the consequences whether he likes it or not. This has been recognised by the establishment of a Psychological Warfare Branch with Military formations to carry on propaganda which is meant to play on civilian morale, and thereby to prevent the efficient prosecution of the war by depressing the efficiency of the civilians.

It cannot be, therefore, doubted that if the accused did in fact betray Neral Moreira the fact of his arrest was of great material advantage to the Occupying Power.

Mr. Sharma has said that Mr. Moreira's evidence is undoubtedly true and the Court agrees. But at the same time the Court does not reject the evidence of Sgt. Yoshimura on this point because it is also the Court's opinion that Sgt. Yoshimura's evidence was truthful in the extreme. Sgt. Yoshimura's evidence on this point is as follows :—

(a) He told the accused that he had certain vague information about Moreira's activities and he requested that the accused find out more information on the matters concerned. His terms of reference may be said to be the establishment of definite proof of Moreira's guilt with regard to the foreign broadcasts, and

(b) Any other information likely to point to subversive activities with Mr. Palmun of Cameron Highlands. He states further—that it was definitely on the information provided by the accused that he arrested Neral Moreira.

It will be noticed in passing that as far as Moreira is concerned, the allegations against him referred to subversive activities with the civilian population and not with the AJA or Force 136.

With regard to Mr. M. M. Deen, the terms of reference given by Yoshimura were that Deen was mixed up with Salleh. At that time, Salleh was under a cloud and suspected, himself, of subversive activities and Yoshimura wanted therefore to know what the connection between Deen and Salleh was. He then stated:

> It was not until I received information from the accused that I became suspicious. Accused told me that Deen was mixed up in the affair concerning

the dropping of paratroops at Grik who were stirring up the local population. I did not know this till the accused told me.

The object, as has been stated in the evidence, of Salleh passing on this information as to the paratroops was for Deen and Phang Kwee Chen to report on the reactions of the Japanese and the civil population and also to pass on any information regarding Japanese troop movements.

With regard to Phang Kwee Chen who was at that time in the area of Cameron Highlands, his duty was the same but in his case the information was intended for Col. Dobree who at that time was organising the guerillas in the Grik and Lenggong area. Any information, therefore, given by the accused on this matter might well have prejudiced the safety and the efficient operation of the guerillas in these two areas.

From the evidence of Sgt. Yoshimura there can be no doubt at all in the mind of the Court that it was on information received from the accused that these arrests were made.

Th evidence of Chan Tin Weng and that of Leong Sze Chun are not material to the case for the prosecution and had their evidence not been present the Court could have come to the same conclusion as it now has, but we would like to make it clear that we accept the evidence of both these individuals and we are of the opinion that Sgt. Yoshimura has forgotten the incident of the Heiho, Leong Sze Chun. That being the case, therefore, we have no doubt at all in our minds but that the accused did provide information on which Sgt. Yoshimura acted.

As it was made clear at the beginning, this is not a Court of morals and it now remains for us to decide as to whether or not the accused was guilty of an offence punishable at law and not of grave moral turpitude in betraying his friends which although reprehensible is not an offence known to the law. The first thing, therefore, is to consider the matter of the intention of the accused.

We agree that in the first instance, although requested by Sgt. Yoshimura, he did not give any information concerning Moreira. He in fact obeyed the advice of his friend Lau Seng Fook to behave like the Three Wise Monkeys — hear no evil, see no evil and speak no evil — as a result of which he was tortured, and brutally tortured. At the end of this torturing, he was released by Yoshimura who asked him to obtain further evidence regarding Moreira and Yoshimura denied that he ever threatened him after that last occasion.

It is also within the judicial knowledge of this Court that when Sgt. Yoshimura was tried by the War Crimes Commission, no charge of murder was preferred against him. The Court therefore believes Yoshimura's statement that if persons refused information he might torture them but he never killed them and that if they refused in the first instance he did nothing about it. An example of this might be taken in Dr. Cassim who, Yoshimura said, visited him once at 29 Station Road and he asked him to do something and Dr. Cassim refused. Dr. Cassim was never interfered with and it might be said at this point that the Court does not believe for one moment, the evidence of Defence Witness Azaiah. Nor does the Court believe the accused on this matter. We wish to make it clear that we do not consider that the accused was a truthful witness. He had tried to mislead the Court and I would refer to accused's evidence on one point concerning his alleged help to Mr. Cummings. Mr. Cummings has denied that in fact accused did ever help him beyond being a member of the Peace Preservation Corps, to which all right minded citizens belonged.

Lau Seng Fook, his friend and counselor, was a wise and sound businessman. After the torturing of the accused, Lau Seng Fook advised him to go to Penang and set up his business in Penang and that he would finance him. But the accused did not take advantage of the offer.

We have no doubt that the accused was paying subscriptions and helping the MPAJA in the Cameron Highlands. We do not accept the prosecution's suggestion that the accused was doing so as a blind to cover his real activities but we do think that had the accused not been in an area where the MPAJA was so strong, he would not have supported it. We think therefore that the accused's support of the MPAJA was purely a matter of necessity. There is no doubt that the MPAJA and their associates trusted him to a certain extent and there is also no doubt therefore that had he wanted to he, like Chan Tin Weng, could have disappeared into the jungle with his wife and family, under the protection of the MPAJA.

Finally, the most damning thing is that he never warned his three friends that he was in fact spying. And even if he had been in fear of instant

death which we do not for one minute admit, the least that he could have done was to have warned them what was happening. It is true that he did give a half-hearted warning to Moreira and advised him not to send further incriminating matter to Palmun but he did not warn either Phang Kwee Chen or Deen and went so far in Phang Kwee Chen's case as to supply Yoshimura with the photograph, P. 2.

It is quite obvious therefore to the Court that the accused is a complete moral coward. He was prepared to run with the hare and to hunt with the hounds so long as it preserved his skin.

It is our opinion that the defence, as the prosecution has pointed out, has confused motive with intention. The accused's motive may have been to give as little information concerning Moreira, Deen and Phang Kwee Chen as he could to satisfy Yoshimura. But the fact remains that the very information that he was asked to get would have been of invaluable aid to the enemy had an invasion taken place, as they would have been aware of the agents of Force 136 in the Grik and Lenggong area and those persons who were furnishing information to the guerillas in the Ipoh area. The fact that the information that was obtained by the accused was not very specific is immaterial for anyone who has had anything to do with intelligence work knows that from the slightest and apparently irrelevant statement much can be built later. The accused, therefore, must have realised, or if he did not realise should have realised, that what he was doing was in fact calculated to assist the enemy in the case of Moreira by depriving the civilian population of the correct Allied news and thereby lowering its morale and in respect of the other two, information about paratroops and guerillas on whom laid the responsibility of creating the fog and chaos of war by sabotaging the enemy's lines of communication.

The last question to be considered is whether the accused was in fact acting under such duress as to deprive him from being able to form the necessary mens rea.

As had been indicated above, the Court finds it a fact that Sgt. Yoshimura never threatened the accused at any period subsequent to the infliction of torture and that the accused was not under threat of death or injury and we find that the accused was in fact a free agent acting for his own ends to secure himself in the eyes of the Japanese.

We now come to the specific charges. With regard to the charge in which Moreira is concerned we would point out that the Occupying Power has a right to request the help of the inhabitants for putting down subversive activities. We are satisfied that the betrayal of Moreira implicated only Moreira and the civil population who were listening to his propaganda. This was contrary to Article 6 of the Maintenance of Public Peace and Order Law. We therefore find that Sgt. Yoshimura had a right to engage the accused in such work and that the accused has not committed any offence by obeying him on that matter. The fact that his action has betrayed an old school friend and trusted colleague may be utterly despicable but is not a criminal offence, and on this charge, therefore, the accused stands acquitted.

With regard to the charges relating to the betrayal of Deen and Phang Kwee Chen, these people had information concerning troops who were under the command and the control of the Supreme Allied Commander. The accused, therefore, should not have under any circumstances supplied the information nor should Sgt. Yoshimura have requested him so to do under Rule (iii) above referred to — "that a belligerent is forbidden to compel the inhabitants of territory occupied by him to furnish information about the army of the other belligerent or about its means of defence." (Hague Rule 44). And on this point I would like to refer to *Oppenheim*, 5th Edition at p. 337, quoted by learned Counsel for the prosecution :—

> Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes them, likewise acts lawfully. Indeed, espionage and war treason bear a twofold character. For persons committing acts of espionage or war treason are—as will be shown below—considered war criminals and may be punished, but the employment of spies and traitors is considered lawful on the part of belligerents.

Therefore, we find that second and third charges are proved and that the accused is guilty.

As regards the punishment of the accused, it is quite obvious from the evidence that has been led that the accused was not a confirmed traitor but was

only prepared to give such information as would keep him on good terms with the Occupying Power. We appreciate all he has done for the MPAJA and we are prepared to accept Mr. Sharma's interpretation that the accused was moved by patriotic and not by base motives in this matter. The fact that he has betrayed the three friends is not one that the Court will take into consideration when it comes to consider sentence to be imposed. But the Court must consider the awful consequences of the accused's selfish acts which might have been had Deen and Phang Kwee Chen in fact under the terrible torture to which they were subjected given the information in their possession concerning the movements of the paratroops and their possible plans and the names of those persons who were the agents of those two magnificent bodies — Force 136 and the MPAJA — who were at that time awaiting the signal to descend from the hills and massacre and utterly annihilate the forces of the oppressor.

We feel therefore that though the accused is not as guilty as some of those who have been here before this Court that these two offences are not such as can be overlooked and the accused is sentenced on the Second Charge to Three years R.I. and on the Third Charge to Three years R.I., the Sentences to run concurrently. The accused has 14 days from today in which to lodge a petition for review. The Court allows the period of two months and 10 days which the accused has already spent in custody before being released on bail to count as part of the sentence.